



DALLAS COUNTY
DISTRICT ATTORNEY
JOHN VANCE
Appellate Section

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January 19, 1994

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Opinion Committee

The Honorable Dan Morales
Attorney General of Texas
P.O. Box 12548
Capitol Station
Austin, Texas 78711

RE: Opinion Request

Dear Attorney General Morales,

MBJ

FILE # ML-24236-94

I.D.# 24236

RQ-658

This opinion is requested by both the Dallas County Criminal District Attorney's office and by the criminal district judges of Dallas County.

A number of Dallas County trial court judges are under the impression that they do not have the authority to appoint or compensate an attorney to represent an individual convicted of capital murder in a post-conviction habeas corpus proceeding brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07.

The Criminal District Attorney of Dallas County seeks an opinion on the following issues:

1. May a trial court judge (Criminal District Court, Judicial District Court) of Dallas county appoint an attorney from Dallas county to represent an individual convicted of capital murder in a post-conviction habeas corpus proceeding brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07?

2. May a trial court judge (Criminal District Court, Judicial District Court) direct the Dallas county commissioners to pay an attorney from Dallas county appointed to represent an individual convicted of capital murder in a post-conviction habeas corpus proceeding brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07?

3. May a trial court judge (Criminal District Court, Judicial District Court) appoint as attorney an agency, legal aid society, such as the Texas Resource Center, or law firm to represent an individual convicted of capital murder in a post-conviction habeas corpus proceeding, brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07?

4. May a trial court judge (Criminal District Court, Judicial District Court) direct the Dallas county commissioners to pay an agency, legal aid society, such as the Texas Resource Center, or law firm, appointed as attorney to represent an individual convicted of capital murder in a post-conviction habeas corpus proceeding brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07?

5. May a trial court judge (Criminal District Court, Judicial District Court) of Dallas county appoint as attorney, an agency, legal aid society, such as the Texas Resource Center, or law firm located outside Dallas county, to represent an individual convicted of capital murder in a post-conviction habeas corpus proceeding, brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07?

6. May a trial court judge (Criminal District Court, Judicial District Court) of Dallas county direct the Dallas county commissioners to pay an agency, legal aid society, such as the Texas Resource Center, or law firm located outside Dallas county appointed as attorney to represent an individual convicted of capital murder in a post-conviction habeas corpus proceeding brought pursuant to TEX. CODE CRIM. PROC. ANN. art. 11.07?

The Dallas County Criminal District Attorney's office is unable to find any state statute which directly addresses these questions. Certain statutes, however, indirectly address some of these issues.

TEX. CODE CRIM. PROC. ANN. art. 1.051 provides for representation of counsel, in pertinent part, as follows:

(a) A defendant in a criminal matter is entitled to be represented by counsel in an adversarial judicial proceeding. The right to be represented by counsel includes the right to consult in private with counsel sufficiently in advance of a proceeding to allow adequate preparation for the proceeding.

(b) For the purposes of this article and Articles 26.04 and 26.05 of this code, "indigent" means a person who is not financially able to employ counsel.

(c) An indigent defendant is entitled to have an attorney appointed to represent him in any adversary judicial proceeding that may result in punishment by confinement and in any other criminal proceeding if the court concludes that the interests of justice require representation. If an indigent defendant is entitled to and requests appointed counsel, the court shall appoint counsel to represent the defendant as soon as possible.

(d) An eligible indigent defendant is entitled to have the trial court appoint an attorney to represent him in the following appellate and post-conviction habeas corpus matters:

(1) an appeal to a court of appeals;

(2) an appeal to the Court of Criminal Appeals if the appeal is made directly from the trial court or if a petition for discretionary review has been granted;

(3) a habeas corpus proceeding if the court concludes that the interests of justice require representation; and

(4) any other appellate proceeding if the court concludes that the interests of justice require representation.

TEX. CODE CRIM. PROC. ANN. art. 26.04, the general appointment of counsel statute, provides as follows:

(a) Whenever the court determines that a defendant charged with a felony or a misdemeanor punishable by imprisonment is indigent or that the interests of justice require representation of a defendant in a criminal proceeding, the court shall appoint one or more practicing attorneys to defend him. An attorney appointed under this subsection shall represent the defendant until charges are dismissed, the defendant is acquitted, appeals are exhausted, or the attorney is relieved of his duties by the court or replaced by other counsel.

This provision does not, by its terms, mention the appointment of counsel to represent a capital defendant in a post-conviction writ of habeas corpus.

Yet, TEX. CODE CRIM. PROC. ANN. art. 26.05, the statute which deals with payment, provides, in pertinent part, as follows:

A counsel,... appointed to represent a defendant in a criminal proceeding, including a habeas corpus hearing, shall be reimbursed for reasonable expenses incurred with prior court approval for purposes of investigation and expert testimony and shall be paid a reasonable attorney's fee for performing the following services, based on the time and labor required, the complexity of the case, and the experience and ability of the appointed counsel:

(1) time spent in court making an appearance on behalf of the defendant as evidenced by a docket entry, time spent in trial, or time spent in a proceeding in which sworn oral testimony is elicited;

(2) reasonable and necessary time spent out of court on the case, supported by any documentation that the court requires; and

(3) preparation of an appellate brief to a court of appeals or the Court of Criminal Appeals.

(b) All payments made under this article shall be paid in accordance with a schedule of fees adopted by formal action of the county and district criminal court judges within each county, except that in a county with only one judge with criminal jurisdiction the schedule will be adopted by the administrative judge for that judicial district.

(c) Each fee schedule adopted will include a fixed rate, minimum and maximum hourly rates, and daily rates and will provide a form for reporting the types of services performed in each one. No payment shall be made under this section until the form for reporting the services performed is submitted and approved by the court and is in accordance with the fee schedule for that county.

(d) All payments made under this article shall be paid from the general fund of the county in which the prosecution was instituted or habeas corpus hearing held and may be included as costs of court.

(e) If the court determines that a defendant has financial resources that enable him to offset in part or in whole the costs of the legal services provided, including any expenses and costs, the court shall order the defendant to pay the amount that it finds the defendant is able to pay.

This article indicates that an attorney appointed to represent a capital defendant at a hearing could be paid. This clearly indicates that an implied power to appoint may exist, though at what stage of a post conviction proceeding is not clear.

Case law indicates that a duty to pay a court appointed attorney is mandatory. Smith v. Flack, 728 S.W.2d 784, 789-790 (Tex. Crim. App. 1987). The propriety of the appointment, however, for purposes of investigating and filing an 11.07 writ remains. If appointment of an attorney for compensation for purposes of evaluating a capital defendant's rights to a post-conviction writ of habeas corpus and filing that writ are appropriate, then a duty would be placed on the Dallas County Commissioners to pay that fee.

Of some value may be an analogy to TEX. CODE CRIM. PROC. ANN. art. 11.39. That section provides that, "[i]f neither the county nor the district attorney be present, the judge may appoint some qualified practicing attorney to represent the State, who shall be paid the same fee allowed district attorneys for like services." Since the trial court could clearly both appoint and pay a prosecutor in a habeas corpus proceeding, it follows that appointment and payment of a defense attorney would not be inappropriate.

While the United States' Supreme Court has not directly addressed the issue of appointed counsel in post-conviction habeas corpus proceedings, that Court has ruled that neither

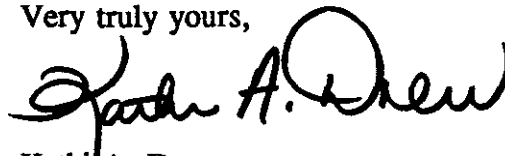
due process nor equal protection require the appointment of counsel for the filing of discretionary state's appeals or petitions for writs of certiorari. Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974). This seems somewhat at odds with other rulings of that Court which afford assistance of counsel to an accused on an initial appeal as a matter of right. See Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed. 2d 811 (1963).

The State can find no law at all which directly¹ addresses the issue of whether an agency, legal aid society, or law firm regardless of location, can be appointed as an "attorney" for a capital defendant.

Clearly, an agency or corporation cannot "practice law" in the sense that such an entity cannot be licensed to practice law. Applicable statutes in the Texas Government Code also speak exclusively of "persons". See, for example, TEX. GOV'T CODE §81.102(a) (a person may not practice law in the State unless the person is a member of the State bar); §82.037 (each person admitted to practice law...) However, TEX. PENAL CODE ANN. § 1.07(a)(27) defines "person" as "an individual, corporation, or association". While an agency, legal aid society, or law firm could not be licensed by the State Bar per se, it should be possible for an agency, legal aid society, or law firm, which clearly deals in the practice of law, to be appointed as the entity responsible for providing a capital defendant with legal representation in a post-conviction habeas corpus proceeding.

Thank you for your attention to this matter.

Very truly yours,



Kathi A. Drew
Assistant District Attorney
Dallas County, Texas



Teresa Tolle
Assistant District Attorney
Dallas County, Texas

cc: The Honorable Tom Price
Presiding Judge, 282nd Judicial District Court

Kerry Young
Chief Staff Attorney
Dallas County Criminal District Judges

¹ The closest cases which have been located dealing with this subject are Touchy v. Houston Legal Foundation, 432 S.W.2d 690 (Tex. 1968) and Scruggs v. Houston Legal Foundation, 475 S.W.2d 604 (Tex. App. -Houston [1st Dist.] 1972, writ ref'd). Neither addresses this specific issue.